Nos. 14-1167 (L), 14-1169, 14-1173

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, et al., ***Plaintiffs-Appellees,***

JOANNE HARRIS, et al., on behalf of themselves and all others similarly situated, ***Intervenors,***

v.

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of the Norfolk Circuit Court, ***Defendant-Appellant,***

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, ***Defendant-Appellant,***

MICHÈLE B. McQUIGG, in her official capacity as the Clerk of the Prince William County Circuit Court, ***Intervenor-Appellant.***

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

BRIEF ON BEHALF OF JANET M. RAINEY

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 14-1167 Caption: Bostic v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records,
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Stuart A. Raphael Date: February 27, 2014

Counsel for: Janet M. Rainey

CERTIFICATE OF SERVICE

****

I certify that on 2/27/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

See attached list of counsel.

/s/ Stuart A. Raphael
(signature)

February 27, 2014
(date)

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ISSUE PRESENTED FOR REVIEW

Whether it violates the Due Process and Equal Protection Clauses for Virginia to deny the right of marriage to same-sex couples and to refuse to recognize same-sex marriages lawfully performed elsewhere.

STATEMENT OF THE CASE

Plaintiffs Timothy B. Bostic and Tony C. London brought this action in July 2013 to invalidate Virginia's laws denying marriage rights to same-sex couples. Plaintiffs sued Governor Robert M. McDonnell; Attorney General Kenneth T. Cuccinelli, II; and George E. Schaefer, III, the Clerk of the Circuit Court of the City of Norfolk. (JA 34.) By agreement of the parties (JA 52), an amended complaint added two new plaintiffs, Carol Schall and Mary Townley (JA 57). The Plaintiffs dismissed the Governor and Attorney General (JA 77) and added defendant Janet M. Rainey, the State Registrar of Vital Records. (JA 57, 62.) The parties agreed that the State Registrar is the proper State defendant.

Rainey and Schaefer answered, defending Virginia's same-sex-marriage ban (JA 82, 95), and all parties moved for summary judgment (JA 105, 209, 215). They completed the briefing by October 31, 2013. (JA 22.)

On November 5, 2013, Mark R. Herring was elected Attorney General of Virginia, but the result was not certified until December 18, 2013.

On December 20, 2013, Michèle B. McQuigg, in her official capacity as the Clerk of the Prince William County Circuit Court, moved to intervene to defend Virginia's ban. (JA 217.) She argued that Herring supported "marriage equality" and was "not likely" to defend Virginia's ban. (ECF #73 at PageID# 671.)

On December 23, 2013, Judge Arenda L. Wright Allen set the case for argument on January 30, 2014. (JA 23.)

On January 11, 2014, Herring was inaugurated as the Commonwealth's 48th Attorney General. (JA 244.) On January 23, he filed a notice of change in position, setting forth the legal analysis that led him to conclude that Virginia's same-sex-marriage ban violates the Fourteenth Amendment. (JA 239-50.) He also discussed the authority of the Executive Branch to enforce but not defend a law that the Attorney General has concluded is unconstitutional. (JA 244-50.) He noted that both Clerks continued to defend the ban (JA 249) and explained that, notwithstanding his conclusion that the ban is unconstitutional, he would work "to ensure that both sides of the issue are responsibly and vigorously briefed and argued to facilitate a decision on the merits, consistent with the rule of law." (JA 244.) Finally, he advised that Rainey will continue to enforce the ban pending a definitive judicial ruling. (*Id.*)[1]

[1] The Virginia Catholic Conference (VCC Br. 4-5 & n.2 (Doc. 85-1)) does not accurately describe the Attorney General's responsibilities and ignores the legal

The district court issued its ruling on February 13, 2014 (amended February 14). *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 14, 2014) (JA 347) ["*Bostic*"]. The court declared unconstitutional:

> Va. Const. Art. I, § 15-A, Va. Code §§ 20-45.2, 20-45.3, and any other Virginia law that bars same-sex marriage or prohibits Virginia's recognition of lawful same-sex marriages from other jurisdictions . . . . (JA 386.)

The court also enjoined the Commonwealth from enforcing those laws. (JA 386-87.) But the district court, at the Attorney General's request (JA 293-94), stayed the injunction pending appeal (JA 387).

Rainey, Schaefer, and McQuigg all filed timely appeals. (JA 390-96.) On March 10, this Court expedited the appeal and allowed intervention by the plaintiffs from *Harris v. Rainey*, No. 5:13cv00077 (W.D. Va.), a similar case pending before the Hon. Michael F. Urbanski. (*See* Doc. 38.) Judge Urbanski previously certified *Harris* as a class action (excluding the *Bostic* plaintiffs) on behalf of (1) all unmarried same-sex couples in Virginia and (2) all same-sex couples in Virginia who have married in another jurisdiction. *Harris v. Rainey*,

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authorities cited in the district court (JA 244-50). In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Executive Branch continued to enforce § 3 of the Defense of Marriage Act while simultaneously arguing that it was unconstitutional. Not even a single Justice indicated that the President or Attorney General had acted improperly or irresponsibly in carrying out their duty to uphold the Constitution. *See id.* at 2685-87; *id.* 2699-2702 (Scalia, J., dissenting); *id.* at 2711-12 (Alito, J., dissenting).

No. 5:13cv77, 2014 U.S. Dist. LEXIS 12801, at *3 (W.D. Va. Jan. 31, 2014). On March 31, Judge Urbanski stayed further proceedings in *Harris* pending the Fourth Circuit's decision here. *Harris v. Rainey*, No. 5:13cv77, 2014 U.S. Dist. LEXIS 45559, at *8 (W.D. Va. Mar. 31, 2014).

STATEMENT OF FACTS

A. Plaintiffs Bostic, London, Townley and Schall.

Timothy Bostic and Tony London have been in a committed relationship since 1989. In July 2013, their request for a marriage license from the Clerk of the Norfolk Circuit Court was refused because they are both men. (JA 111-12, 115-16, 350.) They seek the same rights, privileges, and economic benefits that Virginia law bestows on married couples. (JA 113, 116-17.) Both attested to the emotional pain they have endured as "second-class" citizens. (JA 113-14, 118.)

Plaintiffs Carol Schall and Mary Townley are long-time Virginia residents and have lived in a committed relationship together since 1985. (JA 119-20, 125.) Townley gave birth to a daughter, "*E.*" in 1998, and Townley and Schall have raised *E.* as their mutual daughter. Schall attested to her love for *E.* (JA 120-21 ("I am her mother and she is my child.").)

Schall and Townley described examples of the discrimination they have suffered because of Virginia's ban on same-sex marriage. For instance, when complications occurred during Townley's pregnancy, Schall was prevented from

seeing her in the hospital and was denied information about her condition. (JA 120, 126.) Blocked from marrying in Virginia, they traveled to California in 2008 and were legally married there. (JA 120, 126.) But because Virginia refuses to recognize their marriage, Townley has been unable to legally adopt *E.* as her daughter. (JA 121.) Schall and Townley have also been unable to obtain a birth certificate that lists them both as *E.*'s parents. (JA 121.) Townley must notify the public school system each year that Schall has permission to pick up *E.* from school. (JA 121.) And when Townley and Schall presented documentation to obtain a passport for *E.*, the Post Office worker scratched out Schall's name as a parent, telling Schall "You're nobody, you don't matter." (JA 121.) Because they are unmarried in the Commonwealth's eyes, Schall and Townley: have been unable to obtain spousal health care; have faced discriminatory tax treatment; and have been prevented from taking family medical leave. (JA 122.)

Like Bostic and London, Schall and Townley described their desire to enjoy the economic and non-economic benefits that Virginia grants to married, opposite-sex couples. (JA 123, 127-28). And they expressed similar pain and distress at feeling like "second-class citizen[s]" (JA 123), whose marriage is "'less than' and unequal to other marriages in Virginia" (JA 128).

In spite of all the legal obstacles Schall and Townley have confronted, their daughter *E.* has grown into a well-adjusted, 16-year-old girl. (JA 122.)

B. The State Registrar and the Commonwealth's Circuit Court Clerks.

The State Registrar is the Virginia official "responsible for ensuring compliance with the Commonwealth's laws relating to marriage in general and, more specifically, is responsible for enforcement of the specific provisions at issue in this [case], namely those laws that limit marriage to opposite-sex couples and that refuse to honor the benefits of same-sex marriages lawfully entered into in other states." (JA 62 ¶ 16; JA 254 ¶ 16.) The State Registrar "[a]dminister[s] the provisions" of Virginia law to "ensure the uniform and efficient administration of the system of vital records." Va. Code Ann. § 32.1-252(A)(1) (Supp. 2013). She "[d]irect[s] and supervise[s] the system of vital records and [is] custodian of its records." *Id.* § 32.1-252(A)(2). She also "[d]irect[s], supervise[s] and control[s] the activities of all persons when pertaining to the operation of the system of vital records." *Id.* § 32.1-252(A)(3). Those duties include prescribing the form of the marriage certificate, the application form used by circuit court clerks to issue marriage licenses, and other forms that touch on registering a spouse as the child's adoptive parent. *Id.* §§ 32.1-252(A)(9), 32.1-267(E) (2011). (*See* note 11 *infra*.)

Circuit court clerks are responsible for issuing marriage licenses using the forms prescribed by the Registrar, and for filing the record of the marriage with the Registrar. Va. Code Ann. §§ 20-14 (2008), 32.1-267(D). Under the Virginia Constitution, circuit court clerks are independent constitutional officers elected in

the locality where they serve. Va. Const. art. VII, § 4. They are not among the State officers represented in litigation by the Attorney General. Va. Code Ann. § 2.2-507(A) (Supp. 2013); 1974-75 Op. Va. Att'y Gen. 68.

C. The history of Virginia's ban on same-sex marriage and the legal rights and benefits withheld from same-sex couples.

The current statutes providing for circuit court clerks to issue marriage licenses refer simply to "the parties" to be married, without mentioning gender. *See* Va. Code Ann. §§ 20-16, 20-20 (2008). Those sections were last amended in 1968. 1968 Va. Acts ch. 318.[2]

In 1975, Virginia enacted a statute providing that "[a] marriage between persons of the same sex is prohibited." 1975 Va. Acts ch. 644, *codified at* Va. Code Ann. § 20-45.2. That section was amended in 1997 to add that marriage between "persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable." 1997 Va. Acts chs. 354, 365.

In January 2004, the Virginia legislature enacted further restrictions. House Joint Resolution No. 187 (offered by then-Delegate Robert F. McDonnell), called upon Congress to enact "a constitutional amendment to protect the fundamental

[2] In 1995, Code § 20-14 was amended to delete language that had required that the license be issued by the clerk of the locality "in which the female or the male to be married usually resides." 1995 Va. Acts ch. 355.

institution of marriage as a union between a man and a woman . . . ." H.J. Res. 187 (Va. 2004).[3] It recited that "a federal constitutional amendment is the only way to protect the institution of marriage and resolve the controversy created by . . . recent [court] decisions . . . ." *Id.*

House Bill No. 751 (sponsored by Del. Robert G. Marshall), as finally enacted, prohibited any "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage . . . ." 2004 Va. Acts ch. 983, *codified at* Va. Code Ann. § 20-45.3. It also barred recognizing such relationships from other jurisdictions. *Id.* The original version of H.B. 751 contained intemperate language. For example, it said that "heterosexual marriage requires sexual exclusivity," while "advocates of same sex unions merely prefer sexual exclusivity, but do not demand it." (McQuigg Addendum II at 002.) It also criticized the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), for invalidating laws banning sodomy between consenting adults, saying that the Supreme Court "failed to consider . . . the life-shortening and health compromising consequences of homosexual behavior . . . ." (McQuigg Addendum II at 003.)[4]

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[3] http://lis.virginia.gov/cgi-bin/legp604.exe?ses=041&typ=bil&val=hj187.

[4] McQuigg is incorrect that the recitals were enacted into law (McQuigg Br. 7, 22); they were deleted in committee. *See* http://lis.virginia.gov/cgi-bin/legp604.exe?041+sum+HB751.

In 2005, the General Assembly approved the text of the following constitutional amendment to perpetuate the statutory ban:

> Section 15-A. Marriage. That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.
>
> This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.[5]

The amendment was approved by a vote of 30-10 in the Senate and 79-17 in the House.[6]

In Virginia, constitutional amendments must be approved in two separate legislative sessions, straddling a general election, and then ratified by a vote of the people. Va. Const. art. XII, § 1. In 2006, the General Assembly approved the marriage amendment for the second time by a nearly three-to-one margin in the

[5] 2005 Va. Acts chs. 946, 949.

[6] http://lis.virginia.gov/cgi-bin/legp604.exe?051+sum+HJ586.

House and by more than a two-to-one margin in the Senate. 2006 Va. Acts chs. 944 (Del. Marshall), 947 (Sen. Newman) (the "Marshall-Newman Amendment").[7]

On September 15, 2006, then-Attorney General Robert F. McDonnell issued a formal opinion providing a non-exclusive list of rights and privileges that would be withheld from same-sex couples as a result of their being unable to marry:

> a spouse's share of a decedent's estate, the right to hold real property as tenants by the entireties, the authority to act as a 'spouse' to make medical decisions in the absence of an advance medical directive, the right as a couple to adopt children, and the enumerated rights and obligations included in Title 20 of the Code of Virginia regarding marriage, divorce, and custody matters.
>
> 2006 Op. Va. Att'y Gen. 55, 58 (JA 142).

Other marriage-dependent rights denied to same-sex couples include confidentiality of marital communications, Va. Code Ann. § 8.01-398 (2007), and the right of a "surviving spouse" to share in an award for the wrongful death of the decedent spouse, Va. Code Ann. § 8.01-53(A) (2007).

In November 2006, the electorate approved the Marshall-Newman Amendment by 57-43% (2,328,224 votes cast).[8]

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[7] *See* http://lis.virginia.gov/cgi-bin/legp604.exe?061+sum+HJ41 and http://lis.virginia.gov/cgi-bin/legp604.exe?061+sum+SJ92.

[8] http://www.sbe.virginia.gov/ElectionResults/2006/Nov/htm/index.htm.

SUMMARY OF ARGUMENT

This case was justiciable in the district court and remains so here. Bostic and London were aggrieved by the refusal of Clerk Schaefer's office to issue them a marriage license, and by the Registrar's implementation of Virginia's same-sex-marriage ban through forms and requirements to effectuate it. Plaintiffs Schall and Townley were aggrieved by Virginia's refusal to recognize their California marriage, and their allegations included instances when the Registrar's implementation of the ban adversely affected them. The case remains justiciable here. The Clerks are aggrieved by the injunction against them. And although the State Registrar agrees that Virginia's ban is unconstitutional, she is continuing to enforce Virginia law until the matter can be definitively adjudicated.

Virginia's same-sex-marriage ban violates the Due Process and Equal Protection clauses of the Fourteenth Amendment. Because the ban substantially interferes with the right to marry, it is subject to strict scrutiny. The ban also discriminates on the basis of gender and sexual orientation, triggering at least heightened scrutiny. All of the considerations apply here for the judiciary to be suspicious of laws that discriminate against gay people. And the Clerks' claim that the ban treats men and women equally is like saying that interracial-marriage bans treat blacks and white equally, an argument rejected by the Supreme Court.

The ban cannot satisfy the rational-basis test, let alone more demanding scrutiny. McQuigg's claim that the purpose of marriage is to channel couples into a procreative relationship for the benefit of children is belied by controlling Supreme Court authority that marriage protects those choosing not to procreate and those who are unable to. And the Clerks' argument fails the rational-basis test because it is irrational to think that prohibiting gay people from marrying will make heterosexual couples more like to marry and have children.

The Clerks' position cannot be reconciled with the Supreme Court's three decisions to date protecting the rights of gay people. Those decisions, among others, also show why the Supreme Court's one-sentence dismissal in *Baker v. Nelson*, in 1972, cannot be read to trivialize the issue presented here.

The Clerk's slippery-slope arguments are the same ones used to oppose interracial marriage in 1967; they are no more persuasive today than then. And just as in 1967, the Court should not wait to protect the plaintiffs' constitutional rights simply because political trends suggest that the public increasingly supports marriage equality.

The Court should affirm the judgment of the district court, but it should continue the stay of the injunction pending review by the Supreme Court.

ARGUMENT

The district court's opinion was crafted in language befitting the importance of the question presented here: whether State laws banning same-sex marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Like the court below, every other federal court to consider that question since last term's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), has invalidated State bans or State anti-recognition provisions.[9] The issue is now pending in multiple circuits and will likely be decided by the Supreme Court, in its 2014-15 term, in an appeal from one (or more) of these cases.

This Court should affirm the district court's decision because it correctly held that Virginia's ban on same-sex marriage could not satisfy rational-basis review, let alone heightened or strict scrutiny.

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[9] In chronologic order: *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah Dec. 20, 2013); *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 U.S. Dist. LEXIS 179550 (S.D. Ohio Dec. 23, 2013); *Bishop v. United States ex rel. Holder*, No. 04-cv-848, 2014 U.S. Dist. LEXIS 4374 (N.D. Okla. Jan. 14, 2014); *McGee v. Cole*, No. 3:13-24068, 2014 U.S. Dist. LEXIS 10864 (S.D. W. Va. Jan. 29, 2014) (denying motion to dismiss challenge to W. Va. ban); *Bourke v. Beshear*, No. 3:13-cv-750, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb. 12, 2014); *De Leon v. Perry*, No. SA-13-CA-00982, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. Feb. 26, 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. Mar. 14, 2014); *DeBoer v. Snyder*, No. 12-cv-10285, 2014 U.S. Dist. LEXIS 37274 (E.D. Mich. Mar. 21, 2014).

I. The case is justiciable and presents an ideal vehicle to resolve the question presented.

Clerk Schaefer questions aspects of Plaintiffs' standing.[10] He claims that Schall and Townley, married in California, lack standing to challenge his actions as the Norfolk circuit court clerk, since he plays no role in recognizing out-of-state marriages. He concedes Rainey's role with regard to prescribing marriage forms and serving as custodian of marriage records. But he questions Bostic's and London's standing to challenge Rainey's role with regard to out-of-state marriages, since Bostic and London are not yet married. (Schaefer Br. 15, 22.) These arguments are unpersuasive.

Bostic and London had clear standing to challenge Schaefer's refusal to grant them a marriage license, and to challenge Rainey's role in promulgating a license form that does not apply to same-sex couples. And Schall's and Townley's claims for being denied marital recognition touch on Rainey's responsibilities in several ways.[11] Unlike the Governor or the Attorney General, whom the Plaintiffs

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[10] The Clerks agree that the case was properly decided on cross-motions for summary judgment. (Schaefer Br. 6; McQuigg Br. 10.)

[11] For instance, Schall and Townley complain that they were not permitted to list Schall as *E.*'s parent on a replacement birth certificate. (JA 121.) As the State Registrar, Rainey is the official responsible for promulgating the form, maintaining the record, and overseeing enforcement of rules relating to birth certificates. *See* Va. Code Ann. §§ 32.1-252(A)(2)-(3), (9), 32.1-257, 32.1-269. The Registrar also plays a role in the process by which Schall seeks to adopt *E.* as her daughter. A

correctly dropped in favor of Rainey, the State Registrar bears a "special relation"[12] to the implementation of Virginia's same-sex marriage ban that makes her the correct State official to sue here. Thus, "when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution." *Windsor*, 133 S. Ct. at 2684.

On appeal, this case remains justiciable. The district court's final judgment enjoins Rainey, Schaefer, and McQuigg from enforcing Virginia's ban on same-sex marriage. (JA 388.) Schaefer and McQuigg oppose the district court's ruling and have standing to appeal the injunction against them. Although the Attorney General agrees that Virginia's ban is unconstitutional, he has made clear that Rainey will continue to enforce the ban until a definitive judicial decision can be rendered. (JA 239, 244.) As the Supreme Court held in *Windsor*, "even where 'the Government largely agree[s] with the opposing party on the merits of the

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court must require the preparation of a report of adoption on a form furnished by the State Registrar. Va. Code Ann. § 32.1-262(A). The report provides information necessary for the Registrar to establish a new birth certificate for the person adopted. *Id.* § 32.1-261(A)(1). Similarly, if the Registrar receives a certified copy of an adoption decree entered in another state together with the information necessary to establish a new birth certificate, she must issue a new certificate. *Id.* § 32.1-261(A)(1); *see also* 12 VAC 5-550-280.

[12] *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (noting that the *Ex Parte Young* exception to Eleventh Amendment immunity requires a "'special relation' between the officer being sued and the challenged statute").

controversy,' there is sufficient adverseness and an 'adequate basis for [appellate] jurisdiction in the fact that the Government intend[s] to enforce the challenged law against that party.'" 133 S. Ct. at 2686-87 (quoting *INS v. Chadha*, 462 U.S. 919, 940 n.12 (1983)). And the zealous defense of the ban by Schaefer and McQuigg, and by their twenty-one *amici*, ensures that this Court has the benefit of a "sharp adversarial presentation" of the issues. *Id.* at 2688.

II. Virginia's same-sex-marriage ban violates the Due Process and Equal Protection Clauses.

Courts considering challenges under the Equal Protection Clause apply different levels of judicial scrutiny, depending on the type of government classification at issue. Erwin Chemerinsky, Constitutional Law—Principles and Policies 687-88 (4th ed. 2011). "Strict scrutiny" applies when the government draws distinctions among people based on "suspect" classifications like race or national origin. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2417-18 (2013). "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). So "when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear . . . is precisely tailored to serve a compelling governmental interest.'" *Fisher*, 133 S. Ct. at 2417 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.,

concurring)). When strict scrutiny applies, the government bears the burden to prove both that the reason for the law is "unquestionably legitimate," *id.* at 2419 (citation and quotations omitted), and that the classification is "narrowly tailored to further compelling governmental interests," *id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

Strict scrutiny also applies "when state laws impinge on personal rights protected by the Constitution." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (burdens on fundamental rights "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."). As discussed in the next section, strict scrutiny applies to laws that substantially interfere with the fundamental right of marriage. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

The Supreme Court has applied intermediate or "heightened" scrutiny to government discrimination based on gender or illegitimacy. Chemerinsky, *supra*, at 687, 769. Gender classifications "very likely reflect outmoded notions of the relative capabilities of men and women." *City of Cleburne*, 473 U.S. at 441. Similarly, "illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society . . . ." *Id.* (citation and quotation marks omitted). Thus, the government bears the burden to "establish

an 'exceedingly persuasive justification'" for such classifications and must show "'that the classification serves *important governmental objectives* and that the discriminatory means employed are *substantially related* to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 724 (1982)) (emphasis added).

The least demanding form of judicial review is the rational-basis test, which is reserved for "[a]ll laws that are not subject to strict or intermediate scrutiny . . . ." Chemerinsky, *supra*, at 688. *E.g., Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). "On rational-basis review, a classification in a statute . . . comes to [the court] bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993) (citations and quotations omitted); *Wilkins*, 734 F.3d at 347 ("quite deferential"). Rational-basis review does not mean accepting whatever justifications might be offered. In *City of Cleburne*, for instance, the Court held that, while individuals with mental disabilities are not a suspect class, a local zoning ordinance that prohibited group homes for persons with mental disabilities, but not other groups, lacked a rational basis to support the distinction; it appeared

instead "to rest on an irrational prejudice against the mentally retarded." 473 U.S. at 450.

A. Strict scrutiny applies because marriage is a fundamental right.

1. Laws that substantially interfere with the right to marry are subject to strict scrutiny.

The Supreme Court has consistently ruled that marriage is a fundamental right protected by the Due Process and Equal Protection Clauses.[13] Marriage is among the rights "'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B., v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)). It is no exaggeration to say that marriage is "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Because marriage is a fundamental right, a law that "significantly interferes" with that right is subject to "critical examination," not mere "rational basis" review. *Zablocki*, 434 U.S. at 383 (quotation marks omitted) (striking down

[13] *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992); *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 382-84 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *United States v. Kras*, 409 U.S. 434, 444 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Andrews v. Andrews*, 188 U.S. 14, 30 (1903); *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

requirement that non-custodial parents paying child support seek court approval before marrying); *Boddie*, 401 U.S. at 376 (holding that a divorce could not be denied to an indigent who was unable to afford the filing fees). It is, therefore, "well-settled" that courts must apply "strict scrutiny" to laws and regulations "that 'significantly interfere' with the right to marry." *Waters v. Gaston Cnty.*, 57 F.3d 422, 425 (4th Cir. 1995) (quoting *Zablocki*, 434 U.S. at 388); *accord Woodard v. Cnty. of Wilson*, 393 F. App'x 125, 127 (4th Cir. 2010) (per curiam) (same), *cert. denied*, 131 S. Ct. 1792 (2011); *cf. Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that strict scrutiny did not apply in a prison setting to a regulation requiring the warden's permission for an inmate to marry, but striking down the law as not reasonably related to any legitimate penological interest).

2. The fundamental right is marriage, not same-sex marriage.

The Clerks argue that the fundamental right to marry is not implicated here because *same-sex* marriage is not fundamental and was unknown to the Framers of the Fourteenth Amendment. (Schaefer Br. 34; McQuigg Br. 30-31.) Fundamental constitutional rights cannot be defined away so easily.

The nearly identical argument was rejected in *Loving v. Virginia*, 388 U.S. 1 (1967), where the Court struck down Virginia's ban on *interracial* marriage, despite that it had been in effect since "the colonial period." *Id.* at 6. McQuigg and her amici argue that the Supreme Court has never before recognized marriage

as a fundamental right in the context of same-sex marriage. But no case before *Loving* had recognized a right to interracial marriage either.

In *Zablocki*, moreover, the Court rejected the argument that the right to marry described in *Loving* is somehow limited in scope because the case involved racial discrimination: "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of *fundamental importance for all individuals*." 434 U.S. at 383-84 (emphasis added) (internal citations omitted).

All individuals means all individuals. *Loving* teaches that the Fourteenth Amendment protects the fundamental *right to marry*, even if the way in which it is practiced would have surprised the Framers or made them feel uncomfortable.

The contrary theory that McQuigg advocates is the same theory that Justice Scalia once proposed in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality). Joined only by one other Justice, he argued that fundamental rights must be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6 (Scalia, J., joined by Rehnquist, C.J.). He based that proposition on *Bowers v. Hardwick*, 478 U.S. 186 (1986), where the Court held that gay men did not have a fundamental right to engage in sodomy. *Id.* at 192.

Not only has Justice Scalia's approach in footnote 6 never been accepted by a majority of the Court, it was rejected in two pivotal decisions. First came *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992):

> It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference . . . when the Fourteenth Amendment was ratified. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127-128, n.6 (1989) (opinion of Scalia, J.). *But such a view would be inconsistent with our law* . . . . Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . .
>
> 505 U.S. 833, 847-48 (1992) (emphasis added).[14]

Then, eleven years later, *Lawrence* expressly overruled *Bowers*, the decision on which footnote 6 was premised. The majority explained that *Bowers* had framed the issue too narrowly by asking "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566 (quoting *Bowers*, 478 U.S. at 190.) That inquiry "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." *Id.* at 567.

[14] Justice Scalia later recognized in *United States v. Virginia* that "the Court has not accepted" his view in *Michael H.* 518 U.S. at 568 (Scalia, J., dissenting).

The Clerks are mistaken that *Washington v. Glucksberg*, 521 U.S. 702 (1997), requires a different result. *Glucksberg* declined to recognize a fundamental right to assisted suicide, explaining that such a right could not be found anywhere in "700 years [of] Anglo-American history." *Id.* at 711. McQuigg emphasizes the passage where the Court required that the claimed right be among those "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and that the proponent of the right provide "a careful description of the asserted fundamental liberty interest." *Id.* at 720-21 (citations and quotations omitted). She argues, by analogy, that the "careful description" of the right at issue in this case is "same-sex marriage," not "marriage."

But McQuigg overlooks *Glucksberg*'s explicit distinction between long-established fundamental rights, such as the "right to marry" applied in *Loving*, and rights never before recognized as fundamental, such as the right to assisted suicide at issue in that case. *Id.* at 720, 728-29 & n.19. Nothing in *Glucksberg* says that *established* fundamental rights are restricted to the manner in which they were historically practiced. If that were the case, *Glucksberg* would have overruled *Loving*, and it would have prevented the Court in *Lawrence* from overruling *Bowers*: for neither interracial marriage nor consensual sodomy was protected at the time the Fourteenth Amendment was enacted. It is also implausible that

Glucksberg, without telling anyone, made footnote 6 of *Michael H.* into the law of the land, forgetting its burial in *Casey*.

"Because the right to marry has already been established as a fundamental right . . . the *Glucksberg* analysis is inapplicable here. The Plaintiffs are seeking access to an existing right, not the declaration of a new right." *Kitchen*, 961 F. Supp. 2d at 1203. In other words, the fundamental right at issue here is the right to marriage:

- not the right to *interracial* marriage, *Loving*, 388 U.S. at 6;
- not the right of *prison inmates* to marry, *Turner*, 482 U.S. at 96;
- not the right of *people owing child support* to marry, *Zablocki*, 434 U.S. at 383; and
- not the right to *same-sex* marriage.

See Obergefell, note 9 *supra*, at *31 n.10. As Judge Shelby put it: "[b]oth same-sex and opposite-sex marriage are . . . simply manifestations of one right—the right to marry—applied to people with different sexual identities." *Kitchen*, 961 F. Supp. 2d at 1203.

B. Even absent a fundamental right, heightened scrutiny would apply because the marriage ban discriminates on the basis of sexual orientation and gender.

1. Heightened scrutiny applies to laws that discriminate on the basis of sexual orientation.

The Supreme Court has not yet clarified the level of scrutiny that applies to

laws that discriminate based on sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down an amendment to Colorado's constitution that prohibited localities from enacting laws to protect gay people from discrimination; the Court concluded that the amendment failed "even . . . conventional" rational-basis review. 517 U.S. at 632. In 2003, the Court in *Lawrence* struck down Texas's prohibition of consensual sodomy, concluding that the "statute furthers *no* legitimate state interest which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578 (emphasis added). And last year in *Windsor*, the Court invalidated § 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, explaining that the "purpose and effect" of the law was "to disparage and to injure" same-sex couples whose marriages had been lawfully entered into in another jurisdiction. 133 S. Ct. at 2696. The Court did not have to decide the level of scrutiny to apply to sexual-orientation discrimination, having found *no* legitimate State interest in any of these cases.

The United States Government has concluded that heightened scrutiny applies to laws that discriminate against gays and lesbians.[15] Many of the nation's

[15] Brief of the United States (Merits) at 18-36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-307_pet_usa_merits.pdf.

leading constitutional law scholars agree.[16] And the Ninth Circuit recently held that *Windsor*'s rationale requires heightened scrutiny of a peremptory strike that was based on the juror's sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs*, No. 11-17357, 2014 WL 211807, at *5-9 (9th Cir. Jan. 21, 2014).

The Commonwealth agrees that heightened scrutiny is the proper test for laws that discriminate based on sexual orientation.

a. Fourth Circuit precedent does not foreclose heightened scrutiny.

The Clerks are mistaken that two Fourth Circuit cases dictate applying the rational-basis test to sexual orientation discrimination. (McQuigg Br. 33; Schaefer Br. 42.) Assuming that the holdings in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), and *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002), remain good law after *Lawrence*, those cases are easily distinguished.

Thomasson applied rational-basis review to uphold the military's "Don't Ask, Don't Tell" policy, concluding that service members have "no fundamental constitutional right . . . to engage in homosexual acts." 80 F.3d at 928. But that assumption was invalidated by *Lawrence*, when the Supreme Court overruled its decision in *Bowers* and declared unconstitutional Texas's law against consensual

[16] Brief of Constitutional Law Scholars Bruce Ackerman, et al. 8-13, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), *available at* http://38.106.4.56/Modules/ShowDocument.aspx?documentID=1219.

sodomy. 539 U.S. at 578. *Thomasson* also based its decision on the unique status of the military, explaining that "intense judicial scrutiny" does not apply in that specialized context. 80 F.3d at 928. So even if *Thomasson* remains good law after *Lawrence*, its holding is limited to the military.

Veney applied the rational-basis test to uphold the decision of corrections officials who denied a gay prisoner's request to be transferred from a single cell to a double-occupancy cell. 293 F.3d at 729. The Court followed *Thomasson*'s holding that "there is no fundamental right to engage in homosexual acts generally." *Id.* at 732 n.4. And like the military context in *Thomasson*, the prison context in *Veney* required a "deferential standard even when the alleged infringed constitutional right would otherwise warrant higher scrutiny . . . ." *Id.* (quotation and citation omitted).

Because *Thomasson* and *Veney* were decided before *Lawrence*, and because both involved special settings where the exercise of fundamental rights is legitimately restricted—the military and prisons—neither case controls here.

b. Laws that discriminate on the basis of sexual orientation are inherently suspect.

The Supreme Court has described four considerations informing its decision to apply more exacting judicial scrutiny to laws that discriminate against particular classes or groups:

- whether the group in question has experienced a "history of purposeful unequal treatment," *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973));

- whether the group has "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities," *id.*;

- whether the group exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635 (1986)); and

- whether the group is "relegated to such a position of political powerlessness" as to warrant "extraordinary protection from the majoritarian political process," *Murgia*, 427 U.S. at 313 (quoting *Rodriguez*, 411 U.S. at 28).

While the Supreme Court has not held that all four considerations with regard to a particular group must favor heightened scrutiny, in this case, all four do.

i. Gays and lesbians historically have been subjected to unequal treatment.

What the Federal Government said in *Windsor* cannot be denied: "[g]ay and lesbian people have suffered a significant history of discrimination in this country." Brief of the United States, *supra* note 15, at 22. "No court to consider the question has concluded otherwise, and any other conclusion would be insupportable." *Id.* "For centuries," *Lawrence* observed, "there have been powerful voices to condemn homosexual conduct as immoral." 539 U.S. at 571. And this Court said in *Veney* that one "cannot ignore the fact that homosexuals are subject to bias-motivated attacks from heterosexuals." 293 F.3d at 733. *Accord*

Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010) ("long history of discrimination.").

In short, the first consideration is easily satisfied here.

ii. The discrimination has been unrelated to their abilities or capacity for societal contribution.

When individuals in a group have "distinguishing characteristics relevant to interests the State has the authority to implement," courts have been "very reluctant . . . to closely scrutinize legislative choices" affecting them. *City of Cleburne*, 473 U.S. at 441. Thus, in declining to apply heightened scrutiny to laws relating to persons with mental or physical disabilities, the Supreme Court explained that "the States' interest in dealing with and providing for them is plainly a legitimate one." *Id.* at 442.

The same cannot be said for laws imposing burdens based on sexual orientation. That point was driven home forcefully at oral argument in *Hollingsworth v. Perry*:

> JUSTICE SOTOMAYOR: [O]utside of the marriage context, can you think of any other rational basis, reason for a State using sexual orientation as a factor in denying homosexuals benefits or imposing burdens on them? Is there any other rational decision-making that the Government could make? Denying them a job, not granting them benefits of some sort, any other decision?

> MR. COOPER: Your Honor, I cannot. I do not have any -- anything to offer you in that regard.[17]

Thus, the second consideration for applying heightened scrutiny is present here. Laws that discriminate based on sexual orientation bear no relationship to the abilities of gay people or their capacity to contribute to society.

iii. Gays and lesbians are a discrete class easily targeted for discriminatory treatment.

The third consideration is also present because gay men and lesbians are members of a discrete group or class that is easily targeted for discrimination. The most recent FBI hate-crime statistics show that crimes motivated by "sexual-orientation bias" comprise 20% of *all* hate crimes nationally, second only to crimes based on racial prejudice.[18] In fact, crimes motivated by sexual-orientation bias occur more frequently than crimes based on religion, ethnicity, and disability.[19] The record below established that, in Virginia alone, 270 sexual-orientation hate crimes were reported from 2004 through September 2013. (ECF #26 at 5, ¶ 28.)

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[17] Transcript of Oral Argument at 14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144_5if6.pdf.

[18] Federal Bureau of Investigation, *FBI Releases 2012 Hate Crime Statistics* (Nov. 25, 2013), at http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-hate-crime-statistics.

[19] *Id.*

It is no answer to say that gay men and lesbians could avoid being discriminated against by hiding their sexual orientation. Children born out of wedlock do "not carry an obvious badge" either, *Mathews v. Lucas*, 427 U.S. 495, 506 (1976), yet the Court has recognized that heightened scrutiny is warranted when laws discriminate against them, *Clark v. Jeter*, 486 U.S. 456, 461 (1988). And strict scrutiny applies to laws that discriminate based on alienage, despite that alienage typically cannot be discerned by outward appearance, and despite that aliens can become naturalized citizens and thereby "voluntarily withdraw from disfavored status . . . ." *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

Gay men and lesbians, as a class, exhibit characteristics that define them "as a discrete group." *Bowen*, 483 U.S. at 602. "There is now broad medical and scientific consensus that sexual orientation is immutable . . . . Even more importantly, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made." *Obergefell*, note 9 *supra* at *55. *Accord Martinez v. Holder*, 740 F.3d 902, 910 (4th Cir. 2014) (holding, in context of asylum sought by alien claiming "membership in a particular social group," that members "must share a characteristic that they either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences") (citation and quotation omitted); *Perry*, 704 F. Supp. 2d

at 964 (sexual orientation is "fundamental to a person's identity," a "distinguishing characteristic that defines gays and lesbians as a discrete group").

iv. Gays and lesbians are politically disfavored in Virginia.

In determining whether to impose heightened scrutiny, the importance of the fourth consideration—political powerlessness—remains unclear. Race-conscious affirmative-action measures are subject to strict scrutiny despite that majority-white populations cannot be characterized as politically powerless. *Fisher*, 133 S. Ct. at 2421. And laws that discriminate based on gender are subject to heightened scrutiny even when they favor women over men, *Craig v. Boren*, 429 U.S. 190, 197-204 (1976) (allowing younger women than men to buy beer); and despite that women comprise half the electorate and "do not constitute a small and powerless minority," *Frontiero v. Richardson,* 411 U.S. 677, 686 n.17 (1973) (plurality opinion). Courts continue to apply strict and heightened scrutiny to race and gender classifications despite that an African-American has twice been elected President and women occupy positions of high power in government.

To the extent that political powerfulness is relevant, it is also unclear how to measure it: "one camp emphasizes access to the political process and the other stresses the limitations on what that process can achieve in the face of entrenched discrimination." *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363, 1391 (2011).

Focusing on political participation alone, one could argue that active minority groups seeking civil rights protection may sometimes "possess political power much greater than their numbers." *Romer*, 517 U.S. at 646 (Scalia, J., dissenting). (*E.g.*, Concerned Women Br. 10 (Doc. 97-1) (calling "homosexuals . . . dispro-portionately loud").) On the other hand, the fact that minority groups seek legal protection should not dispel a court's suspicion about laws that discriminate against them. To the contrary, their urgent resort to the political process may be "the important signal not of political power, but of social antipathy of sufficient magnitude to warrant legal redress." Schacter, *supra*, at 1394.

No matter how one evaluates political powerlessness in general, in Virginia, this consideration highlights the need for heightened scrutiny. For whatever success the gay rights movement has had in some States, it has met with failure time and again in the Commonwealth, where gay people remain "a politically unpopular group." *Windsor*, 133 S. Ct. at 2693 (citation and quotation omitted).

The district court was correct when it recognized that prejudice against gay people in Virginia has tended "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities[.]" *Bostic*, *supra*, at *21 (JA 382) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). For example, Virginia's hate-crime law does not protect against crimes

motivated by sexual-orientation bias.[20] Neither Virginia's Human Rights Act[21] nor its Fair Housing Law[22] prohibits discrimination on the basis of sexual orientation. And repeated efforts have failed to expand those laws to protect gay citizens. In fact, the prior Virginia Attorney General catalogued those repeated failures (JA 180 n.4) as evidence of Virginia's "consistent public policy" *not* to recognize sexual orientation "as a protected class" (JA 181), advising Virginia's colleges and universities to remove sexual orientation as a protected class from their existing anti-discrimination policies. (JA 181-82.) And in 2012, the General Assembly enacted a law permitting private child-placement agencies to refuse adoptions or foster-care placements based on an agency's "religious or moral convictions," 2012 Va. Acts chs. 690, 715, *codified at* Va. Code Ann. § 63.2-1709.3 (2013), tacitly authorizing private discrimination based on the sexual orientation of the prospective parents, *Bostic*, *supra*, at *21(JA 382). The district court can hardly be faulted for relying on these facts to conclude that condemnation of homosexuality continues to manifest itself in Virginia in various "state-sanctioned activities." *Id.* at *62 (JA 382).

[20] Va. Code Ann. § 18.2-57(B) (Supp. 2013).

[21] Va. Code Ann. § 2.2-3901 (2011).

[22] Va. Code Ann. § 36-96.3 (2011).

City of Cleburne provides a good contrast. The Supreme Court there found that numerous federal and state laws had been enacted to *protect* the rights of individuals with disabilities. 473 U.S. at 443-45. That fact was critical to the Court's decision to reject heightened scrutiny, since protective laws "*belie[d]* a continuing antipathy or prejudice" and lessened any "corresponding need for more intrusive oversight by the judiciary." 473 U.S. at 443 (emphasis added).

By the same reasoning, Virginia's persistent failure to protect the rights of gay people warrants heightened judicial scrutiny when, as here, the law specifically targets them for discrimination. And that point seems "especially powerful when a ballot measure is used to amend a state constitution and thus to embed unequal treatment of a minority in the state's foundational political commitments." *Schacter*, *supra*, at 1396. "As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it." *Obergefell*, note 9 *supra*, at *55. The fact that the Attorney General of Virginia has now taken up their defense does not mean that laws discriminating against gay people are no longer "suspect," any more than courts stopped applying strict scrutiny to racial discrimination when Attorney General Robert F. Kennedy urged passage of the Civil Rights Act of 1964.

* * *

In deciding to apply judicial scrutiny that is more exacting than mere rational-basis review, courts ultimately must determine whether good reason exists

to be suspicious that the classification in question has resulted from improper prejudice. Courts are suspicious of laws that discriminate based on race, national origin, gender, alienage, and illegitimacy. Such classifications are "suspect" because, in our nation's history, they often spring from prejudice. So we put a heavy burden on the State to justify them. It is simply not credible to argue that courts have no similar reason to be suspicious of laws that discriminate on the basis of sexual orientation.

2. Heightened scrutiny applies because the marriage ban discriminates on the basis of gender.

No one disputes that laws discriminating on the basis of gender are subject to heightened scrutiny. *Virginia*, 518 U.S. at 533; *City of Cleburne*, 473 U.S. at 441. Virginia's same-sex-marriage ban discriminates on the basis of gender by providing that "only a union between one man and one woman may be a marriage valid" in Virginia. Va. Const. art. I, § 15-A. The ban is tied explicitly to gender: only opposite-gender couples may wed; same-gender couples cannot. "[B]ecause of their relationship to one another, [the ban] targets them specifically due to sex." *Perry*, 704 F. Supp. 2d at 996.

What is more, the express reliance by McQuigg and her amici on the gender roles of fathers and mothers reinforces that her defense of Virginia's same-sex-marriage ban carries with it "the baggage of sexual stereotypes." *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979)).

The invocation of such stereotypes is another signal of the importance of subjecting such laws to heightened scrutiny. *Id.*

Although McQuigg argues there is no gender classification here because "both sexes are treated equally" (McQuigg Br. 18), the Supreme Court rejected the same argument in *Loving*. In *Loving*, Virginia's Attorney General claimed that the Commonwealth's ban on interracial marriage treated the races equally because Virginia "punished equally both the white and the Negro participants in an interracial marriage." 388 U.S. at 8. McQuigg cannot persuasively distinguish that aspect of *Loving* from this case. *See Kitchen*, 961 F. Supp. 2d at 1206 (finding that *Loving* rejected the "analogous argument"). Several courts that have accepted McQuigg's both-sexes-are-treated-the-same argument similarly overlooked *Loving*'s rejection of that theory. *E.g.*, *Bishop*, note 9 *supra*, at *91; *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098-99 (D. Haw. 2012).

By contrast, in *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), *appeal pending*, No. 12-17668 (9th Cir.), the district court recognized that *Loving* "might counsel . . . intermediate scrutiny" but then rejected that counsel; the court reasoned that Nevada's same-sex-marriage ban treated the sexes equally, so that proof of intentional gender discrimination was required. *Id.* at 1004-05. *Sevcik*'s reasoning was muddled and the result unpersuasive. It confused the argument that the legislature may have been motivated only by sexual-orientation bias (rather

than gender bias), with the rule that *any* gender-based classification triggers heightened scrutiny, *whatever* the government's reason for invoking gender. As *this* Court said in *Faulkner v. Jones*, "[a]lthough facially neutral statutes which have a discriminatory impact do not violate the Equal Protection Clause unless discriminatory intent can be demonstrated . . . *discriminatory intent need not be established independently* when the classification is explicit, as in this case." 51 F.3d 440, 444 (4th Cir. 1995) (emphasis altered). It does not matter what the legislators' true motives may have been; their explicit use of a gender-based classification demands special justification. What is more, *Sevcik*'s statement that "a homosexual man may marry anyone a heterosexual man may marry" [but only a woman] "and a homosexual woman may marry anyone a heterosexual woman may marry" [but only a man], 911 F. Supp. 2d at 1004, provides cold comfort to gay people who wish to marry the person they love. And it is that person's gender that causes Virginia to block the marriage.

In writing its opinion, this Court should reject the pejorative phrases "genderless marriage" and "marriage-mimicking construct" that McQuigg (but not Schaefer) uses to describe the core freedom at stake here. (McQuigg Br. 6-7.) Marriage between gay people is no more "genderless" than marriage between heterosexuals; gender plays a vital role. And Plaintiffs do not seek to *mimic* marriage; they seek to *marry*. Calling it "genderless" and "marriage mimicking" is

insulting, "just as it would demean" heterosexuals to say that their marriage is "simply about" opposite-sex "intercourse." *Lawrence*, 539 U.S. at 567.

C. The ban cannot survive rational-basis review, let alone heightened or strict scrutiny.

1. It cannot be justified on grounds of morality or religion.

The Clerks do not defend the marriage ban based on the argument that homosexuality is immoral; they recognize that *Lawrence* precludes that claim. 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (citation and quotation marks omitted). Indeed, the "Supreme Court's decision in *Lawrence* removed the *only* ground—moral disapproval—on which the State could have at one time relied to distinguish the rights of gay and lesbian individuals from the rights of heterosexual individuals." *Kitchen*, 961 F. Supp. 2d at 1204 (emphasis added).

Nor do the Clerks attempt to justify the ban on religious grounds. Many good and decent Virginians undoubtedly voted for the Marshall-Newman Amendment because of sincerely held religious beliefs that homosexuality is wrong or that gay marriage conflicts with Biblical teachings. For them, the ban ensured that their "strongly held values" are "reflected in the law." (U.S. Conference of Catholic Bishops Br. 29-30 (Doc. 95-1).)

But religion cannot justify State-sponsored discrimination.[23] "The same Constitution that protects the free exercise of one's faith . . . is the same Constitution that prevents the state from either mandating adherence to an established religion . . . or 'enforcing private moral or religious beliefs without an accompanying secular purpose.'" *DeBoer*, note 9 *supra*, at *44 (quoting *Perry*, 704 F. Supp. 2d at 930-31). Some people have "sincerely held religious beliefs" against interracial dating and interracial marriage. *Bob Jones Univ. v. United States*, 461 U.S. 574, 602 (1983). Yet recognizing that the Constitution prevents the State from enforcing such beliefs does not pronounce the beliefs themselves "illegitimate." (U.S. Conference of Catholic Bishops Br. 30.) It simply recognizes that such views cannot deprive other citizens of their rights.

It should go without saying that striking down Virginia's ban will not obligate religious institutions to perform same-sex weddings. *Kitchen*, 961 F. Supp. 2d at 1214. If anything, eliminating the ban "expands religious freedom because some churches that . . . desire to perform same-sex wedding ceremonies . . . are currently unable to do so." *Id.*

[23] McQuigg's invocation of Blackstone backfires. (McQuigg Br. 21.) Blackstone wrote that English "law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law . . . ." 1 William Blackstone, Commentaries on the Laws of England 421 (1765) (U. Chic. Press 1979).

2. It cannot be justified on grounds of tradition.

Lawrence also forecloses using "tradition" to defend the ban; it is "not a sufficient reason." 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting). The district court was correct: "Tradition is revered in the Commonwealth, and often rightly so. However, tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage." *Bostic*, *supra*, at *15 (JA 372).

3. It cannot be justified by the irrational claim that banning same-sex marriage will make heterosexual couples more likely to marry and have children.

The "responsible procreation" and "optimal child rearing" rationale argues that "traditional" marriage creates the most stable vehicle for bearing and raising children in a family with a "natural" mother and father who can serve as ideal role models. As the previous Virginia Attorney General put it: "the point is that a State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents." (ECF #39 at 23.) McQuigg phrases it a little differently. She says there is a single, "public purpose" of marriage, which is to "channel the presumptive procreative potential of man-woman couples into committed unions for the good of children . . . ." (McQuigg Br. 18 (capitalization altered).) However characterized, the argument fails on multiple levels.

First, the Supreme Court has rejected McQuigg's central thesis that the purpose of marriage is to channel couples into responsible procreation. *Griswold v. Connecticut* upheld the right of married couples *not* to procreate. 381 U.S. 479, 485-86 (1965). And *Turner* found—even in the prison context (where deference to State government approaches its apogee)—that no legitimate interest could support denying inmates the right to marry, despite their inability to procreate, let alone to consummate the marriage. 482 U.S. at 95-96.

What is more, both cases described important values of marriage that transcend mere procreation: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.* Marriage involves "expressions of emotional support and public commitment," "spiritual significance," and "expression of personal dedication." *Turner*, 482 U.S. at 95-96. And it is "often . . . a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock)." *Id.* at 96.

McQuigg's brief does not mention *Griswold* or *Turner*, let alone acknowledge the transcendent marital values they champion. *Griswold* and *Turner* likewise go unnoticed by the State amici who embrace McQuigg's procreation-channeling theory. (State of Indiana Br. (Doc. 89-1).) Her academic friends ignore these cases too. (*E.g.*, Liberty Counsel Br. (Doc. 91-1); George, Girgis & Anderson Br. (Doc. 93-1); Hawkins & Carroll Br. (Doc. 81-1).) That is a sizable omission. The Supreme Court did not find a problem severing the link between marriage and procreation (McQuigg Br. 48); it severed it in *Griswold* and *Turner*.

Second, McQuigg's procreation-channeling theory cannot justify Virginia's ban because it is irrational to think that banning same-sex marriage will make *heterosexual* couples more likely to marry and have children of their own. Judge Shelby said it well:

> [I]t defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support. If there is any connection between same-sex marriage and responsible procreation, the relationship is likely to be the *opposite* of what the State suggests . . . . [T]he State reinforces a norm that sexual activity may take place outside the marriage relationship.
>
> *Kitchen*, 961 F. Supp. 2d at 1212 (emphasis added).

See also DeBoer, note 9 *supra*, at *40 (banning same-sex marriage will not "increase the number of heterosexual marriages or the number of children raised by heterosexual parents. There is, in short, no logical connection . . . .").

McQuigg's position on this issue is internally inconsistent. At one point she concedes that same-sex marriage does not "threaten" the interests of heterosexuals pursuing procreative relationships through marriage. (McQuigg Br. 13, 43.) But later, she cites conservative academics who warn ominously that "redefining marriage would undoubtedly have real-world ramifications" (McQuigg Br. 48), or who postulate that awareness that same-sex couples can marry might somehow turn heterosexual psychology against opposite-sex marriage and in favor of out-of-wedlock births (*id.* 35-36). She rails separately that no-fault divorce laws might be responsible for Virginia's rising divorce rate. (*Id.* 51.)

But none of this can suffice to turn irrational speculation into a rational basis. Even if an expert had testified for McQuigg that allowing same-sex marriage will make fewer opposite-sex couples marry, federal courts do not unthinkingly accept opinion evidence that is "connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). In the record in this case (not to mention every other case), "[n]o one has offered any evidence

that recognizing same-sex marriages will harm opposite-sex marriages, individually or collectively." *Bourke*, note 9 *supra*, at *36-37.

Third, the responsible-procreation/optimal-child-rearing rationale is outright demeaning to both same-sex and opposite-sex couples. It tells those who are not interested in having children, or unable to have them the "natural" way, that their relationships are less important, if not "unworthy." *Windsor*, 133 S. Ct. at 2694. It also "humiliates tens of thousands of children now being raised by same-sex couples," making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id*.

Finally, the rationale has no limiting principle. It would justify denying marriage not only to same-sex couples but to "the infertile, the elderly, and those who simply do not wish to ever procreate." *Bishop*, note 9 *supra*, at *111. As *DeBoer* noted wryly, "the empirical evidence at hand should require that only rich, educated, suburban-dwelling, married Asians may marry, to the exclusion of all other heterosexual couples . . . ." *DeBoer*, note 9 *supra*, at *39. Of course, the "absurdity of such a requirement is self-evident. Optimal academic outcomes for children cannot logically dictate which groups may marry." *Id*. at *39-40.

Only in a dictatorship would the government decide who is allowed to marry based on stereotypes about how successful their offspring may be. It is analogous

to the argument advanced 40 years ago to defend Illinois' law that permanently removed children from the custody of their unwed fathers upon the mother's death. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972). Illinois argued "that Stanley and all other unmarried fathers can reasonably be presumed to be *unqualified* to raise their children." *Id.* at 653 (emphasis added). The Court said that such a startling presumption "cannot stand." *Id.* at 657. The Constitution prohibits a State from "conclusively presum[ing] that any particular unmarried father [is] unfit to raise his child; the Due Process Clause require[s] a more individualized determination." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974).

So too does the Due Process Clause bar McQuigg's irrebuttable presumption that married same-sex couples are not as qualified to be parents as heterosexual, "natural parents." Even assuming for argument's sake "that *some* same-sex couples might be worse parents than some opposite-sex couples, '[a] law which condemns, without hearing, *all* the individuals of a class to so harsh a measure . . . because some or even many merit condemnation, is lacking in the first principles of due process.'" *Bostic*, *supra*, at *19 n.13 (JA 379) (quoting *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 545 (1942) (emphasis added)).[24]

[24] Two separate federal trials have resulted in courts finding no scientifically reliable evidence to support the claim that children raised in same-sex marriages are worse off than children raised in opposite-sex marriages. *DeBoer*, note 9 *supra*, at *8-30, *35-40; *Perry*, 704 F. Supp. 2d at 980-81. *DeBoer* found that the

4. The ban cannot satisfy any level of scrutiny.

McQuigg's principal authority, *Johnson v. Robison*, 415 U.S. 361 (1974), is totally unlike this case. In *Robison*, the Supreme Court held that Congress had a rational basis to limit veterans' education benefits to those who had served in active military duty, rather than alternative civilian service. *Id.* at 381-82. The plaintiff, a conscientious objector, claimed there was no rational basis to distinguish draftees who served in civilian duty, like him, from draftees who served in active duty. *Id.* at 382. But the Court found that providing education benefits only to active-duty soldiers served the rational basis of making people more willing to volunteer for the draft and, once drafted, less unwilling to serve in active duty. *Id.*

Nothing so intelligible justifies denying marriage rights to gay couples. Indeed, the Clerks' justifications are even more attenuated than the excuses Colorado came up with to defend its constitutional amendment denying gay people

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expert witnesses called by Michigan to support its same-sex-marriage ban failed to apply scientific methods and lacked credibility. *DeBoer*, note 9 *supra*, at *19-30. The court found the testimony of Michigan's lead witness, sociologist Mark Regnerus, "entirely unbelievable and not worthy of serious consideration," *id.* at *22, and that a recent study he completed was unreliable because, among other reasons, it was rushed through for a third-party funder for use in litigation. *Id.* at *22-23. Many of the Clerks' amici cite Regnerus's work without mentioning the district court's scathing criticism in *DeBoer*. (Soc. Sci. Profs. Br. (Doc. 83-1); Alvare Br. (Doc. 88-1); Liberty Counsel & Am. Coll. of Pediatricians Br. (Doc. 91-1); Lopez Br. (Doc. 100-1).)

protection from anti-discrimination laws. *Romer*, 517 U.S. at 635. Colorado claimed the amendment was needed to protect the free-association rights of citizens with "personal or religious objections to homosexuality" and "conserv[e] resources to fight discrimination against other groups." *Id.* The Court rejected those arguments and found "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.* The Clerks' arguments fare no better here.

Having failed the rational-basis test, the ban cannot satisfy heightened scrutiny, let alone strict scrutiny. McQuigg (but not Schaefer) argues that the ban is justified by the State's compelling interest in protecting children, but she fails to explain why it has a compelling interest in excluding gay people from marriage, thereby making it harder for gay parents to raise their children. (McQuigg Br. 34.) Indeed, by preventing gay men and lesbians from adopting their life-partner's children, the ban has a "manifestly harmful and destabilizing effect" on families. *DeBoer*, note 9 *supra*, at *16. Children, like Townley's daughter *E.*, have "only one legal parent and are at risk of being placed in 'legal limbo' if that parent dies or is incapacitated." *Id.* And McQuigg does not even mention the legal and economic benefits of marriage that are locked away from same-sex couples—such as spousal privilege, tenant-by-entirety ownership, inheritance rights, statutory-beneficiary status, and medical decision-making authority, to name a few. She

cannot explain why a State has a narrowly tailored and compelling interest in denying *those* important benefits to gays and lesbians who wish to marry.

D. Virginia's ban cannot be squared with *Romer*, *Lawrence*, or *Windsor*.

There is another way to think about this case; one can view it as the logical successor to *Romer*, *Lawrence*, and *Windsor*. As noted above, those decisions did not clearly identify the level of scrutiny to apply to sexual-orientation discrimination. They reflect a "case-by-case approach" of declaring legal principles "only in the context of specific factual situations," and not "expounding more than is necessary" to decide the case at hand. *Culombe v. Connecticut*, 367 U.S. 568, 636 (1961) (Warren, C.J., concurring).

But in the wake of *Romer*, *Lawrence*, and *Windsor*, the outcome here "is virtually compelled." *Bourke*, note 9 *supra*, at 42. Justice Kennedy wrote for the majority in each case, and Justice Scalia dissented each time. Justice Scalia's dissents speak volumes about how the Supreme Court will likely decide this case.

In *Romer*, his dissent emphasized that, because *Bowers* had upheld the constitutionality of laws criminalizing sodomy, homosexuality could justifiably be "singled out for disfavorable treatment." 517 U.S. at 636 (Scalia, J., dissenting). Given sodomy's illegality, he wrote, Coloradans were "*entitled* to be hostile toward homosexual conduct," *id.* at 644, and entitled therefore to maintain the view "that homosexuality is morally wrong and socially harmful," *id.* at 645.

Seven years later, *Lawrence* overruled *Bowers*, rejecting the argument that States could criminalize sodomy as immoral. 539 U.S. at 578. Dissenting again, Justice Scalia said that rejecting moral disapproval as a rational basis for laws criminalizing sodomy meant that other laws would now be "called into question." *Id.* at 590 (Scalia, J., dissenting). He included laws barring "same-sex marriage" among them, and warned: "If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review." *Id.* at 599.

Last year, *Windsor* struck down § 3 of DOMA for placing same-sex couples in a "second-tier marriage" and for disregarding their "moral and sexual choices the Constitution protects . . . ." 133 S. Ct. at 2694. Justice Scalia decried again that the majority's rationale would invalidate State laws barring same-sex marriage. *Id.* at 2709-11. He said that "the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion." *Id.* at 2709.

Without overruling *Romer*, *Lawrence*, and *Windsor*, this case cannot be decided other than as Justice Scalia predicted.

E. Federalism cannot justify denying Due Process and Equal Protection.

The Clerks misunderstand the States'-rights discussion in *Windsor* because they overlook that the federalism argument there worked in tandem with the

Court's conclusion that § 3 of DOMA violated the Due Process Clause. Part III of *Windsor* explained that Congress intruded on the States' traditional regulation of marriage by preventing the federal government from recognizing same-sex marriages in States where those unions are valid. 133 S. Ct. at 2689-93. Part IV then explained why Congress violated the guarantee of equal protection, implicit in the Due Process Clause of the Fifth Amendment, by discriminating against lawfully married same-sex couples, treating them as second-class citizens. *Id.* at 2693-95. The federalism argument buttressed the Court's conclusion that § 3 of DOMA violated the Due Process Clause.

But in a case challenging a State's same-sex-marriage ban, the traditional deference shown to States in domestic relations matters is in direct tension with the due process rights of those who are forbidden to marry. *See Kitchen*, 961 F. Supp. 2d at 1193-94. Cases like this one, therefore, turn on how the Court resolves that conflict.

It takes only a moment's reflection to realize that the Fourteenth Amendment necessarily trumps the federalism claim. It prevails for three reasons. First, the majority in *Windsor* said that DOMA was unconstitutional *not* because it violated the Tenth Amendment (which reserves unenumerated powers to States) but because "it violate[d] basic due process and equal protection principles . . . ." 133 S. Ct. at 2693.

Second, the Court has repeatedly invalidated marriage restrictions on Due Process and Equal Protection grounds *in spite* of countervailing federalism concerns. *Loving* struck down Virginia's ban on interracial marriage despite Virginia's protest that doing so "would be judicial legislation in the rawest sense of that term"[25] and would invade "the exclusive province" of States to decide whether to permit such "alliances."[26] *See Loving*, 388 U.S. at 7-8. *Zablocki* held that persons owing child support could marry, over the State's objection, despite recognizing "domestic relations as an area that has long been regarded as a virtually exclusive province of the States." 434 U.S. at 398 (Powell, J., concurring) (citation omitted) (quotation marks omitted). And when the Court in *Windsor* discussed the States' traditional role in regulating marriage, it made clear, citing *Loving*, that "State laws defining and regulating marriage, *of course*, *must respect the constitutional rights of persons.*" 133 S. Ct. at 2691 (emphasis added). The italicized language is critical; in signaling that due process and equal protection concerns trump federalism, *Windsor*'s "citation to *Loving* is a disclaimer of enormous proportion." *Bishop*, note 9 *supra*, at *66.

[25] Brief and Appendix on Behalf of Virginia, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), *available at* 1967 WL 93641, at *7, *41 (quoting *Loving v. Virginia*, 206 Va. 924, 929, 147 S.E.2d 78, 82 (1966)).

[26] *Id.* at *50.

Third, there is (again) Justice Scalia's assurance in *Windsor* that the outcome in this conflict is foreshadowed "beyond mistaking . . . with regard to state laws denying same-sex couples marital status." 133 S. Ct. at 2709 (Scalia, J., dissenting). As Judge Shelby said in *Kitchen*:

> The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.
>
> 961 F. Supp. 2d at 1194.

And finally, every single court to address the question since *Windsor* has agreed that the due process and equal protection rights of same-sex couples trump the deference owned to States' traditional authority to regulate marriage. *Kitchen*, 961 F. Supp. 2d at 1194; *Bishop*, note 9 *supra*, at *66; *Bostic*, *supra*, at *15-17 (JA 373-74); *DeBoer*, note 9 *supra*, at *44-49; *Bourke*, note 9 *supra*, at *21, *40; *De Leon*, note 9 *supra*, at *52; *Obergefell*, note 9 *supra*, at *27.

III. *Baker v. Nelson* is not controlling.

The Clerks and their amici argue that the Supreme Court already decided this case in 1972, when it declined to review the decision of the Supreme Court of Minnesota[27] that the Fourteenth Amendment did not protect a man's right to marry another man. *Baker v. Nelson*, 409 U.S. 810 (1972) (per curiam). The Supreme

[27] *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

Court issued a one-sentence order dismissing that appeal for lack of "a substantial federal question." *Id.*

The precedential effect of a summary dismissal was set forth in *Hicks v. Miranda*: "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise* . . . ." 422 U.S. 332, 344 (1975) (citation and quotation omitted) (emphasis added). By contrast, the rule that ordinarily prevents lower courts from deciding that a Supreme Court opinion no longer binds them[28] has not been applied to summary dispositions of the type described in *Hicks*. So *Hicks*'s phrase—"except when doctrinal developments indicate otherwise"—describes an important limitation on the precedential effect of summary dispositions.

As set forth above, a doctrinal sea change has occurred since *Baker* was decided in 1972, capped off by *Windsor*. Every district court to address the question since *Windsor* has invalidated State bans against same-sex marriage, finding *Baker* not controlling. *See Kitchen*, 961 F. Supp. 2d at 1194-95; *Bishop*, note 9 *supra*, at *53-62; *Bostic*, *supra*, at *9-10 (JA 362-64); *De Leon*, note 9 *supra*, *23-29; *DeBoer*, note 9 *supra*, at *44-48 & n.6.

[28] *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989).

It is also telling that no Justice mentioned *Baker* in any opinion last term in *Hollingsworth* or *Windsor*. And when the lawyer defending California's Proposition 8 invoked *Baker* at oral argument in *Hollingsworth*, Justice Ginsburg said that *Baker* predated heightened scrutiny for gender discrimination, and was decided when States could criminalize sodomy; "so I don't think we can extract much [from] Baker against Nelson," she said. [29]

IV. The slippery-slope arguments lack merit.

The Clerks and many of their amici resort to slippery-slope arguments, warning that, if States cannot ban same-sex marriage, they will have to allow plural marriage, marriage between siblings, and marriage to young children. Virginia's counsel raised the same specter in *Loving*, arguing that Virginia's "prohibition of interracial marriage" stood "on the same footing as the prohibition of polygamous marriage, or incestuous marriage or the prescription of minimum ages at which people may marry and the prevention of the marriage of people who are mentally incompetent."[30]

These tactics are no more persuasive in 2014 than they were in 1967. Even assuming someone could rationally explain how permitting an interracial or same-

[29] Transcript of Oral Argument, *supra* note 17, at 12.

[30] Oral Argument at 81:10, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), *available at* http://www.oyez.org/cases/1960-1969/1966/1966_395.

sex couple to marry will force the State to permit three or more people to marry, the Supreme Court upheld the constitutionality of laws barring polygamy in *Reynolds v. United States*, 98 U.S. 145, 166-68 (1879). Having *Reynolds* on the books for 135 years establishes weighty *stare decisis* considerations.

Nor would other horribles parade themselves here. As the Supreme Court made clear in *Zablocki*, not every state regulation that relates to marriage is subjected to "rigorous scrutiny." 434 U.S. at 386. "To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Id*. There is, therefore, no threat to Virginia's law requiring parents to consent before their minor children can marry. Va. Code Ann. § 20-48. And although law-school professors might delight in posing hypothetical questions involving fanciful, as-applied challenges to laws against incestuous marriages, Va. Code Ann. § 20-38.1(a), such hypothetical controversies differ in kind and degree from what we confront here. In the real world, there are unlikely to be facial class-action challenges to consanguinity laws. And if facial or as-applied challenges should someday be filed, courts have the doctrinal tools from *Zablocki* and *Loving* to decide them. In the meantime, no bogeyman can justify denying same-sex couples the right to marry when marriage equality is compelled by cases like *Loving*, *Romer*, *Lawrence*, and *Windsor*.

V. The Court should not wait to protect fundamental rights until public opinion has caught up with the law.

As *Romer* shows, the fact that a discriminatory law is embedded in the State's constitution does not insulate it from being struck down under the Fourteenth Amendment. 517 U.S. at 623. That is the point of the Fourteenth Amendment: "No State shall . . . deprive any person of . . . liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Some argue that courts should wait to strike down same-sex-marriage bans because polls suggest that popular support for marriage equality is increasing. The district court was correct that that argument "disregards the gravity of the ongoing significant harm being inflicted upon Virginia's gay and lesbian citizens." (JA 374.) The wait-and-see argument also overlooks the role of federal courts in our democracy. If the Supreme Court had followed that approach in *Loving*, it would not have struck down Virginia's miscegenation laws in light of an apparent trend to repeal them. 388 U.S. at 6 n.5 (noting that, in the preceding 15 years, 14 States had repealed laws barring interracial marriage).

As Justice Jackson wrote eloquently for the Court seventy years ago:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to

> be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; *they depend on the outcome of no elections*.
>
> *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).

The district court correctly followed that guidance here: "[w]hen core civil rights are at stake the judiciary must act." (JA 375.)

VI. The Court should stay the mandate pending review by the Supreme Court.

The trial court was correct to stay its injunction pending appeal, and this Court should likewise stay the mandate pending review by the Supreme Court. Fed. R. App. P. 41(d)(2). As the Attorney General explained below (JA 293-94), it would wreak havoc to permit marriages to proceed under an injunction that the Supreme Court might later stay or set aside. Hundreds of same-sex couples were married after the district court enjoined the bans in Utah and Michigan, only to have the injunctions stayed—and the legality of their marriages placed in limbo—when the Supreme Court and Sixth Circuit, respectively, stayed the injunctions pending appeal. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014). There is no need to create such uncertainty when the issue can be definitively resolved in the Supreme Court's 2014-15 term.

CONCLUSION

One cannot separate the legal question here from the point in history when it is answered. Overlooking that truth was the flaw in Justice Scalia's premise when he asked at oral argument in *Hollingsworth*:

> [W]hen did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted?[31]

The former Solicitor General responded correctly:

> When did it become unconstitutional to prohibit interracial marriages . . . [or] to assign children to separate schools?[32]

The equality-of-right principle in the Fourteenth Amendment is not frozen in time. Its application does not depend on how we think the Framers might answer our legal questions. If it did, the Constitution would not today forbid segregated schools, ensure the freedom to marry persons of a different race, or guarantee equal justice in countless other situations that the Framers did not anticipate.

That is why the Supreme Court has repeatedly said that the principles of the Fourteenth Amendment are timeless, even if the Framers did not foresee their full reach:

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[31] Transcript of Oral Argument, *supra* note 17, at 38.

[32] *Id.*

- "Had those who drew and ratified the Due Process Clause[] . . . known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew [that] times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 578-79;

- "Prejudice . . . rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different . . . from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); and

- "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557.

Each of those passages describes this case. Perfectly.

Because Virginia's same-sex couples are entitled to equal justice under law, the Court should affirm the judgment of the District Court.

Respectfully submitted,

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records

By: /s/

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STATEMENT REGARDING ORAL ARGUMENT

The Court has set this case for argument on May 13, 2014. Oral argument is warranted to enable a full consideration of the important issues presented here.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,927 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/

Stuart A. Raphael

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

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